

**IN THE
MISSOURI SUPREME COURT**

MICHAEL TISIUS,)	
)	
Appellant,)	
)	
vs.)	No. SC86534
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION TWO
THE HONORABLE GARY OXENHANDLER, JUDGE**

APPELLANT’S REPLY BRIEF

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CONSTITUTIONAL PROVISIONS

Mo.Const., Art. I, §10.....	<i>passim</i>
Mo.Const., Art. I, §18(a)	<i>passim</i>
U.S.Const., Amend. VI	<i>passim</i>
U.S.Const., Amend. XIV.....	<i>passim</i>

JURISDICTIONAL STATEMENT

Michael incorporates by reference the Jurisdictional Statement from his opening brief. He maintains that jurisdiction is proper in this Court since the State continues to seek Michael's death in these proceedings. Further, this case is similar to *State v. Shafer*, 969 S.W.2d 719 (Mo.banc 1998), where, after the motion court granted penalty phase relief and Shafer was not under sentence of death on appeal, jurisdiction was properly held to be in this Court.

STATEMENT OF FACTS

Michael incorporates by reference the Statement of Facts from his opening brief.

POINTS RELIED ON

I. WHO OBTAINED THE GUN?

The motion court clearly erred in denying relief on Michael's claim that counsel did not properly object to the State's knowing presentation of false and misleading testimony and argument during guilt phase that Michael obtained the gun by stealth and thus deliberated because this denied Michael due process, a fundamentally fair trial and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that (1) despite the State's knowledge that its witness, Tracie Bulington, stole the gun on Roy Vance's order, it misled the jury by calling Patsy Bulington, who found her gun was missing after the homicides and inaccurately concluded that Michael took it while he was alone in her house before the homicides, and the State argued in closing that Michael stole the gun, thus proving that Michael deliberated, and (2) Counsel Estes objected, stating the argument misstated the evidence but not that the State knowingly misled the jury, and Counsel Wafer did not raise the issue on appeal. A reasonable likelihood exists that the State's misconduct and Counsels' ineffectiveness affected the jury's guilt phase decision, since the State relied on this evidence to prove deliberation. Confidence in the outcome is undermined.

Giglio v. United States, 405 U.S. 150 (1972);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

Copeland v. Washington, 232 F.3d 969 (8th Cir. 2000);

Walter Barton v. State, Benton County Case No. CV199-453CC;

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

II. FAILURE TO CALL HANDWRITING EXPERT

The motion court clearly erred in denying Michael's claim that counsel was ineffective for not investigating and calling a handwriting expert to testify that Roy Vance had written a letter addressed to "Karl" because this denied Michael due process, a fundamentally fair trial and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the defense theory was that the jail-break plan was hatched by Roy Vance and Tracie Bulington, with Michael as their dupe, and that the plan never included harming or killing the jailers. Counsel's failure to have the letter properly authenticated caused the trial court to reject its admission and thus counsel lacked critical evidence that would have shown the jury, from the pen of a co-defendant, Michael's role in the offenses and his lack of deliberation.

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

III. GUARDIANS OF PARADISE T-SHIRT

The motion court clearly erred in denying Michael’s claim that counsel was ineffective for failing to object to references to and the admission of Michael’s t-shirt, which depicted and bore the legend “Guardians of Paradise,” because this denied Michael due process, freedom of speech and association, a fundamentally fair trial and effective assistance of counsel, guaranteed by the First, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§8, 10 and 18(a) of the Missouri Constitution, in that the reference to the “Guardians of Paradise” allowed the jury to speculate about and utilize as evidence of guilt Michael’s association with that group, which, they may have believed, had anti-social connotations to which Michael ascribed. That evidence was irrelevant to any issue for determination in guilt phase and prejudiced Michael’s defense since it allowed the jury to convict Michael, not based on his actions but on his association with an unrelated group.

Chapman v. California, 386 U.S. 18 (1967);

State v. Driscoll, 55 S.W.3d 350 (Mo.banc 2001);

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

VII. IMPROPER STATEMENTS ON VOIR DIRE AND IN ARGUMENT

The motion court clearly erred in denying Michael's claims that the prosecutor committed misconduct in making the following arguments and trial counsel was ineffective for failing to object, object timely or properly preserve objection to those arguments or counsel improperly argued in

VOIR DIRE

1. That Randolph County rarely had cases such as this one and the rarity caused the Attorney General's Office to be involved (T187);

2. And trial counsel failed to voir dire about whether the jurors could consider the different mental states for first and second degree murder, especially in killings of law enforcement officers but merely asked what sentence the jurors could consider if they convicted Michael of first degree murder (T337,346,353-54,357-58,402-03,415,459,516,521).

GUILT PHASE CLOSING

1. That the jurors could convict Michael of second degree murder only if they first found him not guilty of first degree murder (T913,940) and suggesting that second degree murder need not even be considered because it was included in any finding of first degree murder (T939-40);

2. That Michael told Tracie Bulington to "get" Officer White, who was outside, (T919) suggesting that Officer White was another intended victim;

3. That the jurors should consider the photos and an x-ray of the victims' bodies in death in making their guilt phase decisions (T920-21);

4. That the defense argument about deliberation was an "attempt to fool you" and was "incredible sophistry," (T943);

5. That Michael's statements that he was sorry only came after he was caught and were "precious little consolation" to the victims (T938,943); because this denied Michael effective assistance of counsel, a fundamentally fair trial and due process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the arguments were grossly improper, misstated the facts and the law; commented on Michael's failure to testify; implied that Michael had committed uncharged offenses; attempted to inflame the jury's passions and prejudices; attacked defense counsel and Michael; implied the prosecutor had outside, personal knowledge and commented on facts outside the evidence. Counsel's failures to act were not supported by strategic reasons.

Copeland v. Washington, 230 F.3d 969 (8th Cir. 2000);

State v. Storey, 901 S.W.2d 886 (Mo.banc 1995);

Walter Barton v. State, Benton County Case No. CV199-453CC;

United States Constitution, Amendments VI, XIV;

Missouri Constitution, Article I, §§10, 18(a).

ARGUMENT

I. WHO OBTAINED THE GUN?

The motion court clearly erred in denying relief on Michael's claim that counsel ineffectively did not properly object to the State's knowing presentation of false and misleading testimony and argument during guilt phase that Michael obtained the gun by stealth and that he therefore deliberated because this denied Michael due process, a fundamentally fair trial and effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that (1) despite the State's knowledge that its witness, Tracie Bulington, stole the gun on Roy Vance's order, it misled the jury by calling Patsy Bulington, who found her gun was missing after the homicides, and inaccurately concluded that Michael took it while he was alone in her house before the homicides and the State argued in closing that Michael stole the gun, thus proving that Michael deliberated, and (2) Counsel Estes objected, stating the argument misstated the evidence but not that the State had knowingly misled the jury, and Counsel Wafer did not raise the issue on appeal. A reasonable likelihood exists that the State's misconduct and Counsels' ineffectiveness affected the jury's guilt phase decision, since the State relied on this evidence to prove deliberation. Confidence in the outcome is undermined.

As it attempts to distance itself from Mr. Ahsens' misconduct in this case that occasioned Judge Oxenhandler's grant of penalty phase relief, the State first argues that free-standing prosecutorial misconduct claims are not cognizable. (State's Brief at 21-22). The State ignores that both here and in *Walter Barton v. State*, Benton Co. Case No. CV199-453CC, the motion court granted relief on independent, free-standing prosecutorial misconduct claims involving Mr. Ahsens. That those courts also found ineffective assistance claims meritorious does not diminish the independent viability of the misconduct claims. Further, the State's suggestion that prosecutorial misconduct claims are only cognizable if they involve the withholding of exculpatory evidence is inaccurate since Rule 29.15 clearly authorizes any claim that results in constitutional error. Moreover, this Court often has addressed such claims in capital cases. *See e.g., State v. Storey*, 901 S.W.2d 886 (Mo.banc 1995); *see also, Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000).

The State also attempts to escape from Mr. Ahsens' misconduct by asserting, contrary to the record, that Mr. Ahsens did not mislead the jury. The State asserts that the motion court's finding that Mr. Ahsens did not mislead the jury is unassailable since it is a finding of fact. (State's Brief at 25). While Michael's burden is high—he must demonstrate that the motion court clearly erred, Rule 29.15(k)—it is not impossible to meet. Here, a review of the record clearly demonstrates both that Mr. Ahsens misled the jury **and** that the motion court's findings were clearly erroneous.

During guilt phase, Mr. Ahsens did not call Michael's co-defendant, Tracie Bulington, but called her mother, Patsy. On direct examination, Patsy testified that, two to three days before the homicides, she and Tracie left the house to pick up child support money, leaving Michael in the house alone. (T697-99). Patsy testified that, after the homicides, she looked for her .22 gun and a box of ammunition but could not find them. (T699-700).

In the initial portion of the State's closing, the prosecutor argued that deliberation was shown because "they also were looking for a gun." (T917). Thereafter, in Mr. Ahsens' final closing, he argued,

Let's talk about deliberation since that is the only difference. And they admit, they admit that he did everything else. Let's talk just about deliberation. This weapon was taken by stealth. We know that because Patsy Bulington told us that.

[Defense Counsel]: I'm going to object, Your Honor. Again a misstatement of the evidence.

[Prosecutor]: Reasonable inference.

THE COURT: The objection will be overruled.
(T940).

Mr. Ahsens' argument makes his intent crystal clear. The jury heard no evidence or argument in guilt phase to suggest that Tracie had stolen her parents' gun. Ahsens instead told the jury to think about what Patsy had said. And what had she said? That Patsy and Tracie had left Michael alone in the house and that

later, when she searched for the gun, it was gone. The jury clearly could connect the dots in the picture Ahsens painted for them. The only problem was the picture was false since Tracie, not Michael, stole her parents' gun. Ahsens knew it, and defense counsel should have corrected it.

Presenting false and misleading evidence and argument is prosecutorial misconduct, depriving the defendant of his state and federal constitutional rights to a fair trial and due process. *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). A new trial is warranted if such false evidence and argument could, in any reasonable likelihood, have affected the jury's judgment. *Giglio*, 405 U.S. at 154.

As Ahsens himself recognized, the sole issue in guilt phase was whether Michael deliberated. The jury was out for more than six hours. (T945-49). During their deliberations, they underlined that portion of the reasonable doubt instruction that states the law "does not require proof that overcomes every possible doubt." (T953). Whether Michael deliberated was a close question. A reasonable likelihood exists that Ahsens' misleading evidence and argument tipped the scales toward finding Michael guilty of first degree murder.

Ahsens ignored the truth and presented false and misleading evidence and argument in his quest for Michael's conviction and death sentence. He did not misstate the evidence, as defense counsel Estes suggested, since he did not tell the jury that Patsy Bulington had accused Michael of stealing her gun. What Ahsens did was more subtle, but no less damaging. He misled the jury by suggesting to

them that it was Michael who stole the gun when he knew the truth was something entirely different. Ahsens knew about Tracie Bulington's pretrial statement and her deposition. He knew that she, not Michael, had stolen the gun. This Court must condemn Ahsens' false and misleading suggestion. *Giglio*, 405 U.S. at 153.

This Court must reverse and remand for a new trial because of the State's presentation of false and misleading evidence and argument and because defense counsel failed adequately to object.

II. FAILURE TO CALL HANDWRITING EXPERT

The motion court clearly erred in denying Michael's claim that counsel was ineffective for not investigating and calling a handwriting expert to testify that Roy Vance had written a letter addressed to "Karl" because this denied Michael due process, a fundamentally fair trial and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the defense theory was that the jail-break plan was hatched by Roy Vance and Tracie Bulington, with Michael as their dupe, and that the plan never included harming or killing the jailers. Counsel's failure to have the letter properly authenticated caused the trial court to reject its admission and thus counsel lacked critical evidence that would have shown the jury, from the pen of a co-defendant, Michael's role in the offenses and his lack of deliberation.

The State attempts to divert this Court's attention from counsel's ineffective assistance in not attributing the letter to "Karl" to Roy Vance, the instigator of these events, by saying that counsel could not have forced Roy Vance to give up a handwriting exemplar. (State's Brief at 35). Thus, the State asserts, had counsel sought a handwriting expert, it would have been a meaningless act. (State's Brief at 35-36).

The State's argument misses the point in several respects. First, the State in the Roy Vance trial had obtained handwriting exemplars from Roy and it was the State who had Robin Russell compare those exemplars to the "Karl" letter. (MEx83 at 2). While Russell's comparison actually occurred after Michael's trial, nothing precluded Michael's trial counsel from requesting those exemplars from the State so that the analysis could take place for Michael's trial. Second, a review of the documents that Russell compared demonstrates that counsel would not have had to request an exemplar from Roy himself. The documents that Russell considered were writings that Roy produced while in the Randolph County jail. (MEx83 at 10). Since Russell obtained those documents from the Randolph County Jail, and they were all dated in the year 2000, they were clearly available at the time of Michael's trial.

The State also contends that Michael was not prejudiced by counsel's failure to have the letter admitted into evidence because the letter would not have shown that Michael was the follower, not the leader, in what occurred. (State's Brief at 36-37). The State's argument on appeal belies its argument at trial.

The State told the jury to ignore Michael's statement and to find that he was a major actor in these events. It told them, "...he brought the weapon hidden in his clothing. Is that deliberation? That's planning, friends. That's more than deliberation. He planned to use whatever force was necessary." (T941). The jury never heard the defense theory—that Michael was Roy and Tracie's dupe—from

the one person who could have explained the plan and should have taken responsibility for his actions, but never did—Roy Vance.

The jury was out for six hours in this case deciding the sole question before them—did Michael deliberate? The prosecutor argued at length in closing that the jury could find deliberation. He stressed that Michael had a gun and that he knew the risks of entering the jail. (T915-16). The defense could have rebutted the State’s argument through Roy’s letter to Karl.

The letter explained Roy’s, and by extension, Michael’s, thinking. It explained—to Karl, a potential co-conspirator—that their purpose was to break Roy out **without** causing any loss of life, **without** even alerting the authorities about who had done the jail-break until they were long gone. (MEx83). It further explained that they had analyzed the situation and did not believe the risk was great, as long as it “was done right.” (MEx83). Contrary to the State’s argument, their plan, their deliberation, was to accomplish a jail-break, not to commit a murder. The letter would have helped to prove this. But, since counsel did not properly authenticate it, the trial court would not admit it.

The State focused, in its guilt phase opening argument, on Roy and Michael’s “plan” and argued that their plan encompassed shooting the officers. Roy’s letter directly refutes this. Their true desire was to avoid confrontation and to break Roy out of jail. Contrary to the motion court’s findings, the letter also demonstrates that the plan was Roy and Tracie’s, not Roy and Michael’s. After all, the letter to Karl, one of Roy’s friends, expressed that **Tracie**, not Michael,

had been discussing the plan with Karl and that, if Karl would help, he should consult **Tracie**, not Michael. The letter, therefore, would have helped to establish that Michael was a follower; that he acted as Roy and Tracie's dupe, not as one of the planners of the jailbreak.

Given the bright line the State shone on the planning of the jailbreak, and its argument that the planning established deliberation, counsel's failure to ensure that the jury saw the letter was devastating. This Court must reverse and remand for a new trial.

III. GUARDIANS OF PARADISE T-SHIRT

The motion court clearly erred in denying Michael’s claim that counsel was ineffective for failing to object to references to and the admission of Michael’s t-shirt, which depicted and bore the legend “Guardians of Paradise,” because this denied Michael due process, freedom of speech and association, a fundamentally fair trial and effective assistance of counsel, guaranteed by the First, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§8, 10 and 18(a) of the Missouri Constitution, in that the reference to the “Guardians of Paradise” allowed the jury to speculate about and utilize as evidence of guilt Michael’s association with that group, which, they may have believed, had anti-social connotations to which Michael ascribed. That evidence was irrelevant to any issue for determination in guilt phase and prejudiced Michael’s defense since it allowed the jury to convict Michael, not based on his actions but on his association with an unrelated group.

The State asserts that no error occurred by the State’s presentation of a t-shirt that Michael possessed, but was not wearing at the time of the offense or when he was arrested, despite that the t-shirt bore the legend “Guardians of Paradise” and a picture of a snarling, fire-breathing, winged beast with talons. (State’s Brief at 40-42).

First, the State maintains that the t-shirt was relevant since it was “evidence seized from the appellant when he was arrested and was, like the jeans with one of

the victim's blood, likely worn at the time of the crime.” (State's Brief at 43).

While the jeans, which were shown to have one of the victim's blood on them, were clearly relevant, the t-shirt was not. No evidence was adduced that Michael wore it at, before or after the offense. It was merely part of his property.

Evidence must be relevant to be admissible. Relevance has two prongs: logical relevance means the evidence tends to make the existence of a material fact more or less probable. *State v. Smith*, 32 S.W.3d 532, 546 (Mo.banc 2000); *State v. Anderson*, 76 S.W.3d 275, 276 (Mo.banc 2002). Legal relevance means the probative value of the evidence outweighs its prejudicial effect. *Id.* Prejudicial effect encompasses unfair prejudice, issue confusion, misleading the jury, undue delay, wasted time, or cumulativeness. *Id.*; *State v. Sladek*, 835 S.W.2d 308, 314 (Mo.banc 1992)(Thomas, J., concurring).

What material fact did the t-shirt prove? None. As in *State v. Driscoll*, 55 S.W.3d 350, 354 (Mo.banc 2001), its logical relevance was “tenuous at best.” Its legal relevance was nonexistent. What is the possibility of prejudice engendered by the t-shirt? Why would the prosecutor have shown the t-shirt to the jury? Had it been a “Sponge Bob Square Pants” t-shirt, would it have been so displayed?

The State suggests that no prejudice could have been engendered by the t-shirt because the jury **might** also have “seen it as a tribute to Far Eastern mythology, the handiwork of a creative mind, or simply just a shirt.” (State's Brief at 41-42 n.6). To say that this t-shirt could merely have been viewed as a tribute to Far Eastern mythology is akin to saying that Driscoll's jury merely might have

considered his tattoos evidence of his appreciation of fine body art and not as evidence of his membership in a racist prison gang. As in *Driscoll*, the risk exists that the jury considered the t-shirt as evidence of Michael's participation in or endorsement of an anti-social group. Thus, only if the State can show that the error in admitting the t-shirt was harmless beyond a reasonable doubt can the judgment of guilt be affirmed. *Driscoll*, 55 S.W.3d at 356; *Chapman v. California*, 386 U.S. 18, 24 (1967).

Since the State cannot show beyond a reasonable doubt that the error did not contribute to the verdict, a verdict arrived at after the jury deliberated for six hours, this Court must reverse and remand for a new trial.

VII.IMPROPER STATEMENTS ON VOIR DIRE AND IN ARGUMENT

The motion court clearly erred in denying Michael’s claims that the prosecutor committed misconduct in making the following arguments and trial counsel was ineffective for failing to object, object timely or properly preserve objection to those arguments or counsel improperly argued in

VOIR DIRE

1. That Randolph County rarely had cases such as this one and the rarity caused the Attorney General’s Office to be involved (T187);

2. And trial counsel failed to voir dire about whether the jurors could consider the different mental states for first and second degree murder, especially in killings of law enforcement officers but merely asked what sentence the jurors could consider if they convicted Michael of first degree murder (T337,346,353-54,357-58,402-03,415,459,516,521).

GUILT PHASE CLOSING

1. That the jurors could convict Michael of second degree murder only if they first found him not guilty of first degree murder (T913,940) and suggesting that second degree murder need not even be considered because it was included in any finding of first degree murder (T939-40);

2. That Michael told Tracie Bulington to “get” Officer White, who was outside, (T919) suggesting that Officer White was another intended victim;

3. That the jurors should consider the photos and an x-ray of the victims' bodies in death in making their guilt phase decisions (T920-21);

4. That the defense argument about deliberation was an "attempt to fool you" and was "incredible sophistry," (T943);

5. That Michael's statements that he was sorry only came after he was caught and were "precious little consolation" to the victims (T938,943); because this denied Michael effective assistance of counsel, a fundamentally fair trial and due process, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§10 and 18(a) of the Missouri Constitution in that the arguments misstated the facts and the law; commented on Michael's failure to testify; implied that Michael had committed uncharged offenses; attempted to inflame the jury's passions and prejudices; attacked defense counsel and Michael; implied the prosecutor had outside, personal knowledge and commented on facts outside the evidence. Counsel's failures to act were not supported by strategic reasons.

The State again asserts that this Court need not address Ahsens' misconduct, since it is merely "a claim of trial error that could have been raised on direct appeal," and claims of prosecutorial misconduct have only been permitted based on the prosecutor's having withheld exculpatory evidence. (State's Brief at 63-64). The State again ignores that both here and in *Walter Barton v. State*, Benton Co. Case No. CV199-453CC, the motion court granted relief on independent, free-standing prosecutorial misconduct claims involving Mr. Ahsens.

That those courts also found ineffective assistance claims meritorious does not diminish the independent viability of the misconduct claims. Further, the State's suggestion that prosecutorial misconduct claims are only cognizable if they involve the withholding of exculpatory evidence is inaccurate. Rule 29.15 clearly authorizes any claim that results in constitutional error. Moreover, such claims are often addressed in capital cases. *See e.g., State v. Storey*, 901 S.W.2d 886 (Mo.banc 1995); *see also, Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000). In *Copeland*, for example, the federal court granted relief based upon the state's misconduct in argument and defense counsel's failure to object to that argument.

This Court should reverse and remand for a new trial.

CONCLUSION

For the reasons set forth in the above Points and Arguments and the Points and Arguments in Michael's opening brief, all of which are incorporated herein by this reference, this Court should reverse and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of August, 2005, one true and correct copy of the foregoing brief and floppy disk(s) containing a copy of this brief was hand-delivered to Richard Starnes, Office of the Attorney General, Missouri Supreme Court Building, Jefferson City, MO 65102.

Janet M. Thompson

CERTIFICATE OF COMPLIANCE

I, Janet M. Thompson, hereby certify as follows:

The attached reply brief complies with the limitations contained in this Court's Rule 84.06. The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, signature block, this certification and the certificate of service, this brief contains 4,418 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk(s) filed with this brief contain(s) a copy of this brief. The disk(s) has/have been scanned for viruses using a McAfee VirusScan program. According to that program, the disk(s) is/are virus-free.

Janet M. Thompson